IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 606, 610, 619

LOUIS BUCHALTER, EMANUEL WEISS and LOUIS CAPONE,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR REHEARING OF APPLICATIONS FOR WRIT OF CERTIORARI

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

COME NOW Louis Buchalter, Emanuel Weiss and Louis Capone and respectfully petition this Honorable Court for a reconsideration of their several petitions for a writ of certiorari to review the judgment of the County Court of the County of Kings, State of New York, as affirmed by the Court of Appeals of the State of New York, whereby your petitioners were adjudged guilty of murder in the first degree, and sentenced to death.

The several petitions were submitted under numbers 606, 610 and 619, respectively, of the October Term, 1942, and were denied by order filed February 15, 1943. The stay of execution, theretofore granted by Mr. Justice Roberts, was vacated. No new date of execution has yet been set; petitioner Buchalter is still a prisoner of the United States of America, confined at Federal Detention Headquarters at New York City; petitioner Weiss and petitioner Capone

are prisoners of the State of New York, confined at Sing Sing State Prison, Ossining, New York.

Counsel for petitioners are not unmindful that full consideration was given to the petitions. Yet they are so convinced that there was a denial of due process in this case, that they believe the failure so to demonstrate was due to fault on their part. In an effort to present a comprehensive review of the proceedings below, the very volume of the matters discussed may have obscured the fundamental problem sought to be presented.

Counsel recognize that while this Court is reluctant to review the administration of justice in the several States, it has repeatedly acted when it believed that fundamental due process had been denied. In this case, the belief that this has occurred arises from no single incident. In other contexts, this Court has recognized the necessity for consideration of all of the elements of a situation and has sometimes spoken of a "bundle of rights". Here it is not amiss to suggest that there has been a "bundle of wrongs".

A fair trial before an unbiased tribunal is the keystone of the structure of justice assured by the Fourteenth Amendment to the citizens of the several States.

Counsel recognize, moreover, the natural reluctance to grant a writ because such action might lead to a plethora of criminal cases in which writs might hereafter be sought.

But this is an unparalleled case; it really has no counterpart. Rarely, if ever, does a case arise where a trial is so grossly unfair that judges of the State Court are moved to say that the defendants had been deprived of "*even a remote outside chance of any free consideration by the jury*".

If this Court can be convinced:

(A) That the trial was held in a poisoned atmosphere, one which in all probability precluded the selection of a fair jury;

(B) That the physical trappings of the trial—for example, the unmanacling of the defendants in the presence of the jury, and the proximity of guards to the witnesses while they testified—were calculated to intensify the hostile atmosphere;

(C) That witnesses for the State were confessed criminals and murderers who had had the opportunity to frame their stories to save their own lives;

(D) That evidence which might have tended to contradict these witnesses was suppressed;

(E) That, by the Trial Judge's charge, cross-examination was derided and the jury was led to condone attempted perjuries by the prosecution's witnesses;

would it then say that what occurred at this trial was not bad enough to warrant its intervention? The petitioners' plea is that they be given the opportunity to convince this Court that these and other factors as well precluded a fair trial.

Nearest in analogy to this case is *People* v. *Becker*, 210 N. Y. 274, to which particular attention is invited, because counsel could not more forcefully present the argument here than was stated by the opinions of the Court in that case. There the New York Court of Appeals intervened. Here the judgment of death was affirmed, despite the fact that an actual majority of the Court of Appeals expressed at least a reasonable doubt of guilt.*

Is there so little merit to a claim of denial of due process where three-sevenths of the Court below said that petitioners were deprived of even *"a fair chance to defend their lives"?* Is such a case so free from doubt that this Court will not hear argument on the merits?

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* In a later case decided by that very Court, *People* v. *Nitzberg* (decided January 21, 1943, not yet officially reported, printed in New York Law Journal, front page, February 17, 1943), it saw fit to denounce the principal witnesses for the prosecution, two of whom were, as here, Tannenbaum and Magoon.

The Chief Judge of the Court of Appeals voted to affirm because, he concluded, the errors at the trial did not affect the verdict. Perhaps that may be, but for a reason different from that assigned by the Chief Judge; this jury was preconditioned to believe that these defendants were guilty, and the Trial Court confirmed that belief by communicating unmistakably to the jury his own conviction of guilt, his own view that the trial was but an irritating and tiresome formality. And the learned Chief Judge apparently did not measure that unfairness by the standard of "due process"; apparently he did not take into account the lurid articles in the local newspapers which, as even the Trial Judge recognized, raised "*havoc with the jurors*" (S. M. p. 614, September 24, 1941).

The other three judges of the Court of Appeals who voted for affirmance spoke through Judge Conway. They found no error. They thought the summation of counsel for Buchalter made immaterial the denunciatory newspaper stories; they failed to perceive that such a summation was an expedient made necessary by the exigencies of the atmosphere created by those very newspaper stories.

I

This case presents directly the question whether, through inadvertence or indirection, the right to trial by a fair and impartial jury may be unwittingly waived and so lost.

This would seem to be a matter meriting review by this Court.

On the appeal below, it was contended that such bias and prejudice permeated the entire panel that no fair trial jury could have been chosen, and that the rulings of the Trial Judge foreclosed any possibility of proper examination and selection of jurors for the trial.

The majority of the Court below, however, in the per curiam opinion denying the motion for reargument (R. 4121), said that no review was permissible of the rulings of

the Trial Court upon challenges for actual bias. It did so in reliance upon a local statute making such rulings of the trial judge final and not reviewable upon appeal.

In this, the majority of the Court below fell into grave error of Constitutional Law which this Court should correct.

The consent, if such it can be called, to be tried by a special jury cannot be tortured into a consent to be tried by a contaminated jury. It is crystal-clear that this whole panel was so infected by prejudice and bias that there was little, if any, likelihood of obtaining a fair and impartial jury. If in this situation, recognized by the Trial Court, as witness his comment that the newspaper articles were "raising havoc with the jurors", it was not his duty on his own motion to declare a mistrial and permit renewal of the motions for a change of venue, then at the very least he should have allowed the widest scope to the investigation of the state of mind of each juror—as indeed at the outset he had promised to do. Not only did he improperly restrict that examination, by his comments and strictures he bludgeoned the talesmen into abjuring prejudice and bias in order to qualify.

Where it is charged, as here, that error intervened to the prejudice of defendants in the rulings of the trial judge which prevented the proper examination of the talesmen upon challenges for actual bias, it is no answer to say that the local statute makes such rulings immune from appeal. The Fourteenth Amendment's guaranty of due process would be idle words were its high purposes so easily circumvented. How, then, would a defendant be guarded against an admittedly hostile jury?

This case is not dissimilar to *Moore* v. *Dempsey*, 261 U. S. 86. There (p. 91) "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and * * * the State Courts failed to correct the wrong". Here it was the same vice, but in more subtle form. Yet the same result—deprivation of due process of law—

ensued. Indeed, the evil is the greater when subtlety replaces violence, because men can, if strong of will, defy and disregard armed threats. They can seldom escape the insidious effect of community-wide prejudice—for its very nature is such that they are ignorant of their being seized and affected by it.

A fair and impartial tribunal for the trial is of the essence of due process. To say, as is implicit in the decision below, that a constructive, as distinguished from an actual, consent to trial by special jury carries with it a consent to give up the right to question the fairness and impartiality of the jury impanelled is not consonant with any concept of due process. And this holding by the Court of Appeals of New York is the more remarkable since New York State does not countenance waiver of trial by jury in a capital case. Article I, Section 2, N. Y. State Constitution; *People ex rel. Battista* v. *Christian*, 249 N. Y. 341. So the startling inconsistency now develops that New York insists upon a jury, but if it is a "special" jury, will not allow inquiry into whether that jury has been properly chosen.

Here, specifically, the highest court of a state has refused to review rulings upon challenges to jurors for actual bias, because a state statute precludes such review. Thereby due process was denied, because in the first instance the Trial Court precluded a demonstration of bias, and the State statute has been said to be a bar to correction of this fatal defect. Unless this Court correct this error, this "hard case" has made "bad law" indeed.

II

Evidence in the possession of the prosecution was earnestly claimed to have been suppressed. The majority of the Court of Appeals indirectly sanctioned that suppression by saying, on reargument, that the evidence was not conclusive.

Is "due process of law" to be determined by such criteria?

The majority of the judges of the Court of Appeals held that certain errors at the trial could be disregarded because it did not think those errors were sufficient to prejudice the jury. But, when it came to consider the refusal of the Trial Court to allow the defendants free access to available evidence, the majority of the judges decided that it probably would not have made a difference—thus usurping, doubtless inadvertently, the province of the jury.

Defendants should not have to demonstrate that the suppressed evidence *would* have changed the result; it should be enough that it *might* have. Surely no one can say with certainty that the jury might not have been influenced by the reports of the police officers who were shadowing Buchalter, thereby corroborating the testimony of the defense witness Shapiro.

It is one thing to say, as did the majority below, that certain errors did not have influence. It is a quite different matter to say that the suppressed evidence would have had no effect.

It is as repugnant to the concept of a fair trial for the prosecution to withhold evidence which might have helped the defense as it is for the prosecution to use evidence which it knows to be false. (Cf., *Mooney* v. *Holohan*, 294 U. S. 103.)

III

The dissenting judges in the Court of Appeals emphasized that while the form of a trial had been observed, the substance and essence of fair play were lacking.

"Fair play" connotes protection against the interposition of extrinsic factors, of extraneous influence. For example, it is not observed where, as here, the prosecutor was allowed in summation to interject the issue of his personal integrity, and to disparage, if not condemn, defense counsel as devil's advocates hired with tainted money. This factor of extraneous influence seems to be the common thread

tying together the various decisions of this Court touching the issue of due process.

In short, the distinction between mere error in the trial and a deprivation of due process of law is the difference between a venial mistake or error of judgment and a failure to provide a safeguard against foul blows.

To appraise individual errors each by itself and to examine "in isolation abstract questions of evidence and procedure" cannot be a fair test whether "due process" was had. To deny a petition for a writ of certiorari here is "to acquiesce in low standards of criminal prosecution". (Frankfurter, J., in *Johnson* v. *U. S.*, decided February 15, 1943, Law Ed. Adv. Op. Vol. 87, p. 503.)

Counsel appreciate that this Court may be hesitant to review a case which received careful consideration by the New York Court of Appeals. But the very divergence of the opinions of the Judges of that Court shows that there was almost an equal division on the question of the fundamental fairness of the trial. Not long ago petitioners would have had the right of direct appeal to this Court. Appeal is nonetheless a privilege they should be accorded where there is such strong doubt that they received a fair trial.

When dissenting judges of such distinction feel that there has been only lip service to fair play (which is all "due process" really means), the case surely is one which involves such fundamental principles as to warrant its review by this Court.

Rare, indeed, are those cases of so close a division on such an issue in the highest court of a State. This Court is not asked to set a precedent for unlimited review of criminal cases from State Courts. But, if cases could come to this Court by certificate from a State Court, it is clear that this case would be so certified, not simply because the majority below remained burdened with a reasonable doubt of guilt, but for a far more important reason.

There is here, certainly, reasonable doubt whether these petitioners received a fair trial. No judgment, especially of death, ever should go unreviewed in this Court where there is reasonable doubt of that.

WHEREFORE, your petitioners, by counsel whose signatures are subscribed, pray that their petitions for a writ of certiorari may be reconsidered.

Counsel certify that this petition is presented in good faith and the sincere belief that it has merit, and not for the purpose of delay.

And your petitioners will ever pray, etc.

LOUIS BUCHALTER, Petitioner,
by I. MAURICE WORMSER,
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Counsel.

EMANUEL WEISS, Petitioner,
by ARTHUR GARFIELD HAYS,
JOHN SCHULMAN,
Counsel.

LOUIS CAPONE, Petitioner,
by SYDNEY ROSENTHAL,
Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 606, 610, 619.—October Term, 1942.

606	Louis Buchalter, Petitioner, *vs.* People of the State of New York.	On Writ of Certiorari to the County Court of Kings County, State of New York.
610	Emanuel Weiss, Petitioner, *vs.* People of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
619	Louis Capone, Petitioner, *vs.* The People of the State of New York.	On Writ of Certiorari to the County Court of Kings County, State of New York.

[June 1, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioners were convicted of first degree murder in the County Court of Kings County, New York, after a trial lasting over nine weeks. The printed record consists of over twelve thousand pages. The judgments were affirmed by the Court of Appeals of the State.[1] Numerous errors were there assigned. Four opinions were written, two of which dissented from the judgments of affirmance, as to which the court divided four to three. In his concurring opinion the Chief Judge said that he agreed with one of the dissenting opinions that errors and defects occurred in the trial which could not be "disregarded without hesitation lest in our anxiety that the guilty should not escape punishment we affirm a judgment tainted with errors obtained through violation of fundamental rights." His conclusion was, however, that the errors did not affect the verdict. Two dissenting judges were of opinion that such substantial error was committed as to require a reversal. One judge was of opinion that the conduct of the trial was so grossly unfair as to leave the defendants without a remote chance of free consideration of their

[1] 289 N. Y. 181; rehearing denied 289 N. Y. 244.

defenses by the jury; so unfair as to deprive them of the presumption of innocence and the requirement of proof beyond a reasonable doubt.

The remittiturs of the Court of Appeals recited that the appellants in brief and argument raised the point that they had been denied their constitutional rights under the Fourteenth Amendment to the Constitution of the United States and that this point was considered and necessarily decided. The same contention was the basis of the petitions for certiorari.

The petitioners rely not on any one circumstance but insist that they were not afforded a fair and impartial jury free from influences extraneous to the proofs adduced at the trial; that they were deprived of an impartial and unbiased judge to preside at the trial and that the prosecutor resorted to unfair methods to influence the jury.

This court granted certiorari in order that the petitioners' claims of denial of a federal right might be examined in the light of the record with the aid of briefs and oral argument. As the opinions rendered in the court below state the facts and discuss the alleged trial errors in detail we need not restate them.

The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as "the law of the land."[2] Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee.[3] But the Amendment does not draw to itself the provisions of state constitutions[4] or state laws.[5] It leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring

[2] Hebert *v.* Louisiana, 272 U. S. 312, 316. See also: In re Kemmler, 136 U. S. 436, 448; Caldwell *v.* Texas, 137 U. S. 692, 697; Lisenba *v.* California, 314 U. S. 219, 236.

[3] Moore *v.* Dempsey, 261 U. S. 86; Powell *v.* Alabama, 287 U. S. 45; Brown *v.* Mississippi, 297 U. S. 278; Avery *v.* Alabama, 308 U. S. 444; Chambers *v.* Florida, 309 U. S. 227; White *v.* Texas, 310 U. S. 530; Smith *v.* O'Grady, 312 U. S. 329; Ward *v.* Texas, 316 U. S. 547.

[4] Rawlins *v.* Georgia, 201 U. S. 638; Patterson *v.* Colorado, 205 U. S. 454, 459; Hebert *v.* Louisiana, *supra*, 316.

[5] Leeper *v.* Texas, 139 U. S. 462; Rawlins *v.* Georgia, *supra*.

to the test of a decision in this court every ruling made in the course of a trial in a state court.[6]

The petitioners assert that, in view of unfair and lurid newspaper publicity, it was impossible to obtain an impartial jury in the county of trial, and that the rulings of the court denying a change of venue, and on challenges to prospective jurors, resulted in the impanelling of a jury affected with bias. We have examined the record and are unable, as the court below was, to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established. Though the statute governing the selection of the jurors and the court's rulings on challenges are asserted to have worked injustice in the impanelling of a jury such assertion raises no due process question requiring review by this court.[7]

The petitioners insist that the rulings upon evidence and instructions to the jury, when taken in their totality, indicate that, whatever the intention of the trial judge, his rulings and attitude precluded a fair consideration of the case. The Court of Appeals held that certain of the challenged rulings and instructions were erroneous but that ~~they~~ the were not substantial in the sense that they affected the ability of the jury to render an impartial verdict, and that others of the alleged errors were not such under the law of New York. As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings.

Finally, the petitioners assert that the prosecuting officer, by suppression of evidence, and by statements in his addresses to the jury, was so unfair as to deprive the trial of the essential quality of an impartial inquiry into their guilt. The point as to the alleged suppression of evidence is without merit. Certain documentary evidence was in court. The judge ruled that the

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[6] Avery v. Alabama, *supra*, 446-447; Leeper v. Texas, *supra*; Howard v. North Carolina, 191 U. S. 126, 136, 137; Burt v. Smith, 203 U. S. 129, 135; Barrington v. Missouri, 205 U. S. 483, 488; Ughbanks v. Armstrong, 208 U. S. 481, 487; Caldwell v. Texas, *supra*, 697; Hebert v. Louisiana, *supra*, 316.

[7] Hayes v. Missouri, 120 U. S. 68, 71; Spies v. Illinois, 123 U. S. 131, 168; Rawlins v. Georgia, *supra*; Franklin v. South Carolina, 218 U. S. 161, 168.

prosecuting officer need not submit it to defense counsel for examination. If there was error in the ruling it was error of the court. Upon motion for rehearing the Court of Appeals examined the papers and found that they were not of significance in respect of any issue in the case. No such showing of suppression of evidence or connivance at perjury, as has heretofore been held to require corrective process on the part of the state,[8] was shown.

The speeches of counsel for defendants apparently provoked statements by the District Attorney of which petitioners now complain. This does not raise a due process question.

As we have recently said, "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.[9]

The judgments are affirmed.

Mr. Justice BLACK, substantially agreeing with these views, is of opinion that the petitions should be dismissed.

Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[8] Mooney v. Holohan, 294 U. S. 103.

[9] Adams v. McCann, 317 U. S. 269, 281.